NO. 80-225 filed 8/11/80

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH E. LOVE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF SOUTH CAROLINA

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The Petitioner, Kenneth E. Love, prays that a writ of certiorari issue to review the opinion and judgment of The Supreme Court for the State of South Carolina rendered in these proceedings on May 13, 1980.

OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is,

as yet, unreported and is Opinion Number 21229. The opinion of the Court of General Sessions for Richland County was given verbally and resulted in a verdict of guilty against Petitioner.

JURISDICTION

The judgment of The Supreme Court for the State of South Carolina was entered on May 13, 1980. This petition for certiorari was filed within ninety (90) days after entry of judgment in accordance with Rule 22(1) of the Rules of The Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the Trial Court err in denying Petitioner's motion to suppress the admission of the testimony of James W. Corley concerning information passed between Petitioner and Mr. Corley, while an attorney-client relationship

existed between the two parties?

2. Did the Trial Judge err in refusing to quash the indictments for Obstruction of Justice because of vagueness, indefiniteness and ambiguity, in violation of Petitioner's rights granted under the Sixth and Fourteenth Amendments to the United States Constitution?

3. Did the Trial Court, in violation of Petitioner's rights to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution err when it failed to grant Petitioner's motion for directed verdict of acquittal as to the indictments for cbtaining money by false pretenses?

4. Did the Trial Judge err in refusing to require separate trials on the indictments for obstruction of justice and for obtaining money by false pretenses, thereby denying Petitioner's right to due process of law

under the Fifth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States.

Sixth Amendment to the Constitution of the United States.

Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF FACTS

The Petitioner, Kenneth E. Love, was indicted by a Grand Jury, in September, 1978, on two (2) counts, each of obtaining goods under false pretenses and obstruction of justice. Subsequently, in December of 1978, the Grand Jury returned an additional indictment for conspiracy.

The indictments alleged that the Petitioner, a former magistrate for Richland County, South Carolina, accepted the sum of Five Thousand

Five Hundred ($5,500.00) Dollars from William Dennis, Jr., in consideration for Petitioner's promise to help Mr. Dennis avoid prosecution for an alleged fourth offense of driving under the influence, and to obtain for Mr. Dennis a new driver's license to replace another which was under suspension.

Petitioner pleaded not guilty to all charges and filed certain motions with the court, both pre-trial, and during the course of the trial. Specifically, he moved the court to suppress the testimony of James W. Corley, Esquire, a Columbia, South Carolina attorney, arising from recordings made by Attorney Corley on April 18, 1978, while counseling Petitioner. Attorney Corley taped the conversation, without Petitioner's knowledge, and elicited from Petitioner a number of statements relating to matters for which he was later indicted.

Agents for the South Carolina Law Enforcement Division had placed recording devices in Attorney Corley's office, with his consent, and statements made by Petitioner and recorded by these devices were used against Petitioner at his subsequent trial. Petitioner challenged the admissibility of Attorney Corley's testimony, declaring that it was a product of a conversation which was protected by an attorney-client privilege, which existed between the two men at the time of the recording, and amounted to a violation of Petitioner's right to counsel as guaranteed under the Sixth Amendment of the United States Constitution.

Second, the Petitioner moved the court to quash indictments for obstruction of justice on the grounds that, among other things, they were so vague as to leave him insufficiently informed

of the charges made against him, violating rights granted under the Sixth and Fourteenth Amendments to the United States Constitution.

Further, the Petitioner moved for a directed verdict of acquittal as to indictments for obtaining money by false pretenses, basing the motion, first, on the belief that the State had failed to prove the intent of the Petitioner to cheat and defraud Mr. Dennis, as alleged in the indictment and as required by statute, and, second, on the belief that the State failed to prove that the Petitioner had made a misrepresentation or false pretense in regard to either past or existing fact, both of these being essential elements of the offense. Because of the trial judge's failure to direct a verdict, Petitioner was denied due process of law, guaranteed under both the Fifth

and Fourteenth Amendments of the United States Constitution.

Finally, Petitioner asserts that, by refusing to require separate trials for the indictments for obstruction of justice and for obtaining money by false pretenses, the trial judge prejudiced Petitioner and violated his right to due process of law guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution.

Each of these motions was denied by the trial judge and a verdict of guilty was handed down. The same basic questions presented here were argued before the Supreme Court for the State of South Carolina. In its opinion of May 13, 1980, the Court affirmed the decision of the trial court.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the

introduction of testimony which should have been properly excluded under the attorney-client relationship. Additionally, the decision below forced the Petitioner to attempt to defend himself against indictments which failed to state an offense, to apprise the Petitioner of the alleged wrong doing, and thereafter, during the trial of this matter, the State failed to prove that the Petitioner made a representation or false pretense in regard to either a past or existing fact. Additionally, the Petitioner's right to a fair trial was severely prejudiced by the Trial Judge's failure to require the State to elect between, or in the alternative, to sever the trials on the two separate indictments, when each charged the Petitioner with separate and distinct offenses occurring on different dates.

I

The decision below allows the introduction of testimony which should be privileged and, therefore, excluded under the attorney-client relationship. By allowing such testimony to be placed into the record, the court denied Petitioner his right to effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution.

The attorney-client privilege is encompassed in Rule 501 of the Federal Rules Evidence, which excludes from introduction at trial any testimony by an attorney pertaining to some legal matter, which was obtained while a professional relationship existed between the lawyer and his client, and Canon 4 of the Code of Professional Responsibility propounded by the American Bar Association, which reads,

in part, "a lawyer shall preserve all confidences and secrets of his client". The principal reason for the adoption of such rules is the "protection of confidential communications between an attorney and his client made because of their professional relationship and it is designed to ensure confidence and complete disclosure between them." United States v. King, 335 F.Supp 523 (S.D. Cal., 1971), United States v. Goldfarb, 328 F.2d 280 (6th Cir., 1964). The theory is based on the belief that, if the client is concerned that damaging facts which he may have been related to his counsel could come out at trial by allowing the attorney to testify, the probability of full disclosure between the parties would be severely diminished.

The basic criteria for the establishment of an attorney-client relationship,

which would trigger the privilege, were set out in United States v. United Shoe Manufacturing Co., 89 F.Supp. 357 (D.C. Mass., 1950), and followed in numerous cases, Bird v. Penn Central Co., 61 F.R.D. 43 (E.D. Pa., 1973), In Re Grand Jury Proceedings, 517 F.2d 666 (C.A. 5, 1975), Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corporation, 294 F.Supp. 1148 (E.D. Pa., 1969). The attorney-client privilege applies only if:

1. The asserted holder of the privilege is, or sought to become, a client;
2. The person to whom the communication was made
   (a) Is a member of the bar of a court, or his subordinate, and,

(b) In connection with this communication is acting as a lawyer;

3. The communication relates to a fact of which the attorney was informed,

(a) By his client,

(b) Without the presence of strangers and,

(c) For the purpose of securing either,

(i) An opinion of law or,

(ii) Legal services or,

(iii) Assistance in some legal proceeding, and not,

(d) For the purpose of committing a crime or tort;

4. The privilege has been,

(a) Claimed and,

(b) Not waived by the client.

Applying these elements to the

instant case, it is apparent that there did exist an attorney-client relationship between the Petitioner and Mr. Corley. First, Petitioner and Attorney Corley had enjoyed a long and ongoing relationship, which had and did include legal representation. During the early part of the conversation of April 18, Petitioner was unwilling to answer questions asked by Attorney Corley and was apparently quite evasive. Attorney Corley used this ongoing attorney-client relationship of trust and confidence to persuade Petitioner that Attorney Corley had Petitioner's interests at heart when, in fact, Attorney Corley, who had agreed with State Agents to draw damaging statements from Petitioner, used the relationship for means which amounted to an interrogation by law officials. Only after Mr. Corley offered legal advise and opinions did Petitioner make the

statements, taped by Attorney Corley, which were later used at Petitioner's trial.

Second, there can be no argument that Mr. Corley was, and is, a member of the South Carolina Bar and is licensed to practice in this state. Further, these communications were directed by Petitioner to Attorney Corley and were made by Petitioner for the purpose of obtaining what he believed would be an informed legal opinion. It is true that Mr. Dennis, an unindicted co-conspirator, was present during the course of the discussion between Petitioner and Attorney Corley. However, "where two or more persons who are subject to possible indictments in connection with the same transaction make confidential statements to their attorneys, these statements... should be privileged." Continental Oil v.

United States, 330 F.2d 183 (9th Cir., 1965), In Re Langswager, 392 F.Supp. 783, (N.D. Ill., 1975). The communications were not previously disclosed to third parties, and, since the prosecution sought to discern the content of what was said in this confidential atmosphere, these holdings would be appropriate.

A further criterion would be whether the advise sought was for the purpose of continuing, or in contemplation of the commission of, a crime. Such a consideration is important because "communications made after the fact of a commission of a crime, fraud, or tort between an attorney and [his client] are protected by the attorney-client privilege, but communications made before the fact, or during the commission of a crime, fraud or tort are not protected by such privilege." Duplan

Corporation v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C., 1975). In the instant case, Petitioner had come to Mr. Corley to discuss the implications of his past actions, and in no way was the advice sought from Attorney Corley designed to further wrongful conduct by Petitioner.

Finally, Petitioner has, in no sense, waived his privilege. He has, in fact, claimed it, as evidenced by his motions at trial to exclude on these grounds the evidence offered by Mr. Corley.

Despite the fact that the acts and attitudes of Petitioner fulfilled the criteria set out in United States v. United Shoe Manufacturing Co., supra, Attorney James W. Corley testified at trial. Much of the State's evidence originated from this conversation and

the evidence obtained was detrimental to Petitioner's case. Since the information received by Attorney Corley was passed on at trial, even though it should have been protected by the attorney-client privilege, this amounts to a violation of Petitioner's Sixth Amendment right to effective assistance of counsel. Quite the opposite of being in allegiance with Petitioner in this matter, Attorney Corley lured him into making statements which were used by the State against Petitioner and helped assure his conviction at trial.

II

The offense of obstruction of justice is a common-law felony usually charged in situations in which the administration of the courts or judicial proceedings are obstructed. Federal statues define the offender as one who endeavors to influence, obstruct or impede the

due administration of justice, 18 U.S.C.A. §1503.

The Petitioner was required, in this case, to attempt to defend himself against indictments which failed to state an offense or appraise Petitioner of the alleged wrongdoing. In each of the two indictments containing charges of Petitioner's alleged obstruction of justice, the State charged only that, in consideration for the money paid by Mr. Dennis, Petitioner promised to carry out a series of actions. There is no allegation by which Petitioner could be informed of the charge or prepare a defense. The Sixth Amendment of the United States Constitution grants the accused a right "to be informed of the nature and cause of the accusation," and this has been read to cover all essential elements of the offense charged, United States v.

Auerbach, 420 F.2d 921 (C.A. 5, 1969). The indictments are, however, silent as to any alleged effort, or an act of obstruction by Petitioner. In no way can promises be said to constitute an actual commission of an act. Petitioner was unable to defend himself against such an indictment. Since the right to be informed of the nature and cause of the accusation is substantial and can not be denied, Grimsley v. United States, 50 F.2d 509 (C.A. 5, 1931) and there can be no conviction or punishment for a crime without formal or sufficient accusation, Spence v. Dowd, 145 F.2d 451 (C.A. 7, 1944), Petitioner should not have been required to answer such uncertain charges.

In State v. McIntire, 71 S.E. 2d 410 (1952), the South Carolina Supreme Court held that, "the true test of the sufficiency of an indictment is not

whether it could have been more definite or certain, but whether it contains the necessary elements of the offense intended to be charged, and sufficiently appraises the defendant of what he must be prepared to meet. The general rule on this question is that the offense must be so described that the accused may know how to answer the charge, the court what judgment to pronounce, and conviction or acquittal thereon may be pleaded in bar to any subsequent prosecution."

Because an insufficient allegation of obstruction of justice was contained in the indictments, the indictments are vague and indefinite as to deprive Petitioner of his rights guaranteed by the Sixth and Fourteenth Amendments. Even the fact that the Petitioner was tried and convicted of the allegations contained in the indictments should

not be of any consequence because, "a constitutional defect in an indictment... is not cured by a verdict." Sutton v. United States, 157 F. 2d 661 (C.A., Ga., 1946).

III

Petitioner's motion for a directed verdict of acquittal on the indictments for obtaining money by false pretenses, made at the conclusion of State's presentation, was based on the fact that the State had failed to prove any intent on the part of the Petitioner to cheat and defraud Mr. Dennis, as alleged in the indictment, and as required by statute. Further, the State failed to prove that the Petitioner made a misrepresentation or false pretense in regard to either a past or existing fact. Both of these allegations are required to be proved since they are essential elements of the offense, South Carolina Code of

Laws (1976), §16-13-240. It is an elementary factor of legal proceedings that each essential element of a crime must be alleged and proven for guilt to attach. "Under our vaunted legal system, no man, mo matter how bad his behavior, may be convicted of a crime of which he is not charged, proven and found guilty in accordance with due process." Parr v. United States, 363 U.S. 370 (1960).

Intent, in the statute, refers to a present state of mind. "It is essential that the fraudulent intent shall have existed at the time the fraudulent representation or pretenses were made or when the thing of value was obtained by reason of such pretenses." 35 C.J.A. False Pretenses §6.

The proof presented by the state illustrated that there existed no present intent by the Petitioner to cheat or defraud Mr. Dennis since, in fact, some

subsequent efforts were made, according to witnesses for the State, to carry out the substance of the promises.

Harrison Heller, Assistant Solicitor for Richland County, South Carolina, testified that Petitioner once asked for a continuance in Mr. Dennis' case. Raymond Scruggs, driver's license examiner for the South Carolina Highway Department, testified that a driver's license receipt Mr. Dennis received from Petitioner was an altered driver's license receipt, while Cornelius Wilson, driver's license examiner for the South Carolina Highway Department, testified that Petitioner attempted to get a driver's license for Mr. Dennis after stating truthfully that Mr. Dennis' license was under suspension.

The State, by offering such proof, lacked an essential element in its attempt to prove that Petitioner had

obtained money under false pretenses. The State showed that Petitioner had no intent to cheat or defraud Mr. Dennis, as illustrated by his attempts to keep the promises he had made.

Furthermore, as held in State v. Haines, 23 S.C. 170 (1885), a promise to do something is not a false pretense. False pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is intended to induce the person to whom it is made to part with something of value. A mere promise to do something in the future is not such a pretense. The State therefore, failed to carry its burden of presenting a prima facie case of guilt on the two charges of false pretenses. Because of the trial court's failure to direct a verdict, the appellant was denied due process of law as guaranteed under the

Fifth and Fourteenth Amendments of the United States Constitution.

IV

Petitioner asserts that he was prejudiced and his right to a fair trial under the Fifth and Fourteenth Amendments was denied by the trial judge's failure to require the State to elect between or, in the alternative, to sever the trials on the two separate indictments, since each charged Petitioner with separate and distinct offenses occurring on different dates.

The Court's refusal to grant Petitioner's motion placed an insurmountable burden on Petitioner. The indictments allege that the first offense occurred in August, 1977, while the second took place in October of 1977. The charges required separate sets of facts, as well as different witnesses. While it is often difficult for a defendant

to gather evidence about, and witnesses to, an event which occurred in the past, it was an unreasonable burden to require Petitioner to correlate and properly prepare defenses to these separate and distinct indictments.

The Court should have anticipated that the simultaneous trial on two separate indictments would be perplexing and confusing to the jury as well as to the defense of the case. It could have been anticipated by the Court that had the prosecution failed to prove one of the indictments, but did succeed in proving the other, that the jury would unfairly make an impermissible link that proof of one would be proof of both. This confusion could have resulted in a shift, or even a release of, the prosecutions' burden. Proof of one indictment would naturally cause the focus of attention of the jury to

move to the Defendant and require him to prove the absence of guilt on the remaining indictments, instead of requiring the prosecution to meet its burden beyond a reasonable doubt. This would serve to confound and prejudice the Petitioner and distract the jury, State v. Nelson, 48 S.C.L. 169 (1867).

The proper procedure when several indictments are sought together is to require the prosecution to elect on which indictment they will proceed, State v. Lee, 147 S.C. 480, 145 S.E. 285 (1928). The test to be applied in such cases where a motion to require an election is made is whether the indictments arose out of the same transaction, State v. Lee, supra.

It is uncontested that the indictments arose from separate and distinct events occurring on different dates and that each indictment required its own

proof beyond a reasonable doubt to prove the guilt of the Petitioner. Hence, the separate and distinct violations, arising out of separate transactions were properly subject to Petitioner's motion to require election and should have been granted. State v. Whitener, 228 S.C. 244, 89 S.E. 2d 701 (1955).

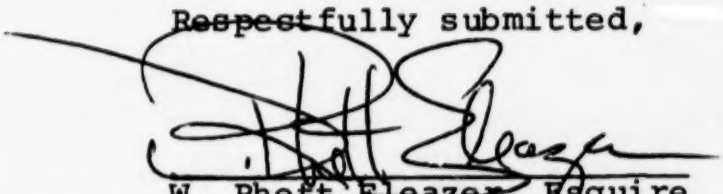
While it is well settled that a motion to require the prosecution to elect is addressed to the sound discretion of the Court, Greenville v. Chapman, 210 S.C. 157, 41 S.E. 2d 865 (1947), it is submitted that, for the foregoing reasons, the trial court clearly and manifestly abused that discretion in failing to require the prosecution to elect which of the indictments on which they desired to proceed. By requiring Petitioner to proceed under this handicap, the court denied Petitioner's Constitutional right to due process

under the Fifth and Fourteenth Amendments to the United States Contitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of South Carolina.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State, ... Respondent

v.

Kenneth E. Love. . . . . Appellant.

Appeal From Richland County

James H. Price, Judge

Opinion No. 21229

Filed May 13, 1980

AFFIRMED

Robert L. Hallman, of Columbia, for appellant.

Attorney General Daniel R. McLeod and Assistant Attorneys General Brian P. Gibbes and Andrew Savage, all of Columbia, for respondent.

Lewis, C.J.: Defendant (appellant), a former magistrate for Richland County, South Carolina, was convicted and

sentenced on two counts of obstruction of justice, two counts of obtaining goods under false pretenses, and one count of conspiracy. He has appealed challenging (1) the sufficiency of the indictments to allege, and the evidence to establish, the claims of obstruction of justice and obtaining goods under false pretenses; (2) the refusal of the trial judge to exclude the testimony of the attorney witness Corley as violative of an attorney-client relationship, (3) the denial of appellant's demand that the State elect between or, in the alternative, grant separate trials on the charges laid in two of the indictments; and (4) the charge to the jury on the offense of obtaining money or goods by false pretenses. We affirm.

The charges against appellant were contained in three indictments--the

first (#171) and the second (#1772) each contained two counts, one count charging obstruction of justice and the other obtaining goods or money by false pretenses. The third indictment charged conspiracy.

Since it materially effects the sufficiency of the evidence to convict, we first dispose of appellant's challenge to the admissibility of the testimony of James W. Corley, Esquire, in which he related conversations between him and appellant. Appellant contends that these conversations should have been excluded on privileged communications between attorney and client.

We have long recognized the attorney-client privilege against disclosure of confidential communications by a client to his attorney. In the case of South Carolina State Highway Department v. Booker, 260 S.C. 245,

195 S. E. 2d 615, in discussing the privilege, we stated:

> This privilege is based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence should not be abused by permitting disclosure of such communications.

This privilege belongs to the client and not the attorney, and may be waived by the client. 81 Am. Jur. 2d, Witnesses, Section 223; South Carolina State Highway Department v. Booker, supra.

In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications

were of a confidential nature. In general, the burden of establishing the privilege rests upon the party asserting it. 81 Am. Jur. 2d, Witnesses, Section 221.

Whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination by the trial judge is conclusive in the absence of an abuse of discretion. 81 Am. Jur. 2d, Witnesses, Section 222.

The conviction of appellant was based upon charges that he accepted the sum of $5500 from one William Dennis, Jr., in consideration of appellant's promise and subsequent attempts to illegally prevent a prosecution against Dennis for driving under the influence, fourth offense, and to illegally obtain a driver's license for Dennis by

using a part of the money to pay off certain public officials or employees who had the authority to return his license. Appellant contends that Corley represented and advised him in these matters and that any communications were made to Corley during the course of this representation.

Corley denies that he represented appellant or Dennis. He testified that appellant apparently had told or given Dennis the impression that he (Corley) was involved in appellant's illegal activities on behalf of Dennis. Upon learning of appellant's illegal activities and his effort to implicate him, Corley went to law enforcement officials, reported his information, and agreed to assist in the apprehension of appellant. As a result, Corley agreed to allow himself to be wired with a surveillance microphone to

transmit and record conversations with appellant and Dennis. This was done and a series of interviews and recorded conversations were held between Corley, appellant, and Dennis. The testimony of Corley and the tapes of these conversations were admitted into evidence over appellant's objection. We think that they were properly admitted.

Based upon the testimony of attorney Corley, his voluntary cooperation with law enforcement officers in the apprehension of appellant, and other circumstances of the case, the trial judge stated that he was convinced beyond a reasonable doubt that attorney Corley never acted as an attorney for appellant in this matter. The record amply sustains this factual finding of the trial judge and clearly renders the testimony admissible, without the necessity of pursuing other, perhaps,

equally tenable grounds.

The next questions concern the sufficiency of the indictments and proof to make out the offenses of obstruction of justice and obtaining goods under false pretenses. Appellant moved to quash the indictments on the ground that there was no allegation of any act constituting either of these offenses; and later moved for a directed verdict of not guilty because of the alleged failure of proof. These motions were denied and are the basis of exceptions on appeal.

We treat first the questions relating to the offense of obstruction of justice. In discussing the offense in the recent cases of State v. Cogdell, _____S. C. _____, 257 S.E. 2d 748, we stated:

> At common law it is an offense to do any act which prevents,

obstructs, impedes or hinders the administration of justice.

In the application of the foregoing principal in Cogdell, we held that the failure to perform the duty of reporting convictions of traffic violations, as required by statute, constituted the common law offense of obstruction of justice.

Indictment No. 1771 alleges that appellant, for the sum of $500.00, promised to obtain for William Dennis, Jr., a valid driver's license and that appellant did deliver to Dennis a driver's license that purported to be valid but which, in fact, was invalid.

The second indictment (No. 1772) alleged that, for the sum of $5000, appellant promised to remove from the public records all reference to the pending charge against William Dennis, Jr. of driving under the influence

and would prevent any prosecution of that charge by bribing the necessary public officials.

Dennis, who paid the money to appellant, was under a charge of driving under the influence, fourth offense. Conviction for this offense automatically suspends the driver's license for a considerable period of time. The design of the traffic laws is to keep individuals convicted of certain offenses from operating motor vehicles upon the highways of this State by suspending the driver's license. The allegations that appellant promised and did deliver to Dennis an invalid driver's license, under circumstances that would induce its use, and promised to remove traffic records and fix the prosecution, sufficiently charged the offense of obstruction of justice in that it impeded and obstructed the due administration of

the traffic laws of this State.

We think the proof established the offenses alleged. As to indictment No. 1771, there was testimony that appellant told a driver's license examiner that, if he could get a driver's license for Dennis, it would be beneficial to the examiner. Subsequently, appellant gave to Dennis, whose license had been suspended, a temporary driver's license which, the examiner testified, was invalid. As to indictment No. 1772, the record shows that appellant asked an investigator for the Public Defender's office if he knew anyone who could stop an indictment; and that appellant later admitted he had paid money to a public employee to obtain help in preventing the prosecution against Dennis for driving under the influence.

Success in the effort to obstruct justice is not necessary to constitute

the offense; it is sufficient if some act is done in furtherance of the endeavor. In this case, appellant delivered a false or invalid driver's license and paid money to a public employee in furtherance of the unlawful endeavor.

The trial judge properly held both the indictment and the proof sufficient to constitute obstructing justice.

The second count in each of the two indictments charged appellant with the offense of obtaining goods or money under false pretenses. Appellant also contends that neither the allegations in the indictment nor the proof were sufficient to sustain these charges.

The offense of obtaining goods under false pretenses id defined in State v. Haines, 23 S. C. 170 as follows:

> A false pretence is such a fraudulent representation of an existing

or past fact by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.

Count 2 of indictment No. 1771 charges that appellant obtained the sum of $500 upon the false representation to Dennis that he would obtain a valid driver's license for him for $500 and that appellant thereafter fraudulently delivered a false driver's license instead of a valid one.

Count 2 of indictment No. 1772 alleges that appellant obtained the sum of $5000 upon the false representations that he would remove the records pertaining to the charges against Dennis from the clerk's office, he would clear the record of pending charges, and would prevent the prosecution for driving under the influence, fourth offense.

The essence of appellant's challenge is that there was no allegation or proof of a representation of a past or existing fact, but rather the representations were in the nature of a promise which is not a false pretense. We disagree.

Appellant is charged in this case with falsely representing that he would do certain things, i.e., provide a valid driver's license, remove evidence of pending charges from the public records, and prevent prosecution of the charge for driving under the influence, fourth offense. There is contained in these promises the implied representation or pretense that he could do the things promised. This pretense of authority or ability constituted a representation or pretense of fact, 35 C.J.S., False Pretenses, Section 12; and supports the charge of obtaining goods under false pretenses.

The indictment in this case adequately informed the appellant of the offense charged, including the nature and falsity of the representation relied on. By falsely pretending that he was in a position to aid Dennis in evading prosecution and the penalties for driving under the influence, and by obtaining his money for that purpose, appellant was guilty of obtaining the money by false pretenses.

The allegations and the proof sustain the charges of obtaining goods under false pretenses.

Appellant also argues that the trial judge erred in refusing to require the State to elect between indictments Nos. 1771 and 1772 or to sever the trials thereon, on the ground that the "indictments alleged separate offenses which occurred on different dates and appellant was thereby prejudiced by the

joint trial."

This argument is without merit. The indictments alleges separate offenses growing out of the same transaction--the illegal fixing of the driving record of Mr. Dennis--and, under these circumstances, there was no requirement that the State elect. State v. Lee, 147 S.C. 480, 145 S. E. 285. The decision to require an election was within the discretion of the trial judge, City of Greenville v. Chapman, 210 S. C. 157, 41 S. E. 2d 865, which we find was not abused in this case.

Finally, appellant challenges the correctness of the charge to the jury on the legal principles governing their consideration of the offense of obtaining goods under false pretenses. The criticism of the charge is based upon the trial judge's instruction that "if an actual representation or one

by necessary implication is made, that one has the authority, the power or the ability to do an act or acts, then even though the act or acts were to take place in the future, the representation, if made, of the authority, power or ability to perform such act or acts would constitute a false pretense if the other elements are established." This instruction is in accord with our holding hereinabove, and we find no error in the charge.

Judgment is affirmed.

LITTLEJOHN, NESS and GREGORY, JJ., and WALTER T. COX, III, Acting Associate Justice, concur.